

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TROY P. REGAS,

Plaintiff,

v.

FREEMONT INVESTMENTS & LOAN;
et al.,

Defendants.

3:10-cv-0366-LRH-VPC

ORDER

Before the court is defendant Mortgage Electronic Registration Systems, Inc.'s ("MERS") motion to dismiss plaintiff Troy P. Regas's ("Regas") amended complaint. Doc. #30.¹

Also before the court is defendants Quality Loan Service Corporation ("Quality"); LSI Title Company and LSI Title Agency, Inc.'s (collectively "LSI") motion to dismiss or for summary judgment (Doc. #33) to which defendant Ticor Title of Nevada, Inc. ("Ticor") joined (Doc. #37).

I. Facts and Procedural History

On February 1, 2007, Regas purchased real property through a mortgage note and deed of trust executed by defendant Fremont Investment & Loan. Regas defaulted on the mortgage and defendants initiated non-judicial foreclosure proceedings.

On May 5, 2010, Regas filed a complaint against defendants. Doc. #1, Exhibit 1. Regas

¹ Refers to the court's docket entry number.

1 subsequently filed an amended complaint on August 16, 2010, alleging eleven causes of action:
2 (1) injunctive relief; (2) declaratory relief; (3) debt collection violations; (4) Nevada Unfair and
3 Deceptive Trade Practices Act, NRS 598.0923; (5) Nevada Unfair Lending Practices Act, NRS
4 598D.100; (6) breach of good faith and fair dealing; (7) violation of NRS 107.080; (8) quiet title;
5 (9) fraud through omission; (10) fraud in the inducement; and (11) unjust enrichment. Doc. #27.

6 Thereafter, defendants filed the present motions to dismiss the amended complaint.
7 Doc. ##30, 33.

8 **II. Legal Standard**

9 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
10 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state
11 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
12 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
13 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
14 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require
15 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
16 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.
17 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

18 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
20 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
21 the court to draw the reasonable inference, based on the court’s judicial experience and common
22 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
23 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
24 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
25 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
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1 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

2 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
 3 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
 4 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*
 5 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
 6 (internal quotation marks omitted). The court discounts these allegations because “they do nothing
 7 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
 8 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to
 9 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
 10 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

11 **III. Discussion**

12 **A. Debt Collection Violations**

13 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal
 14 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,
 15 Regas’s complaint asserts that defendants violated the FDCPA by initiating a non-judicial
 16 foreclosure without following the proper procedures for attempting to collect a debt.

17 It is well established that non-judicial foreclosures are not an attempt to collect a debt under
 18 the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse v. Ocwen Fed. Bank*
 19 *FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev.
 20 2010) (holding that recording a notice of default is not an attempt to collect a debt because the
 21 borrower already consented to allow the foreclosure trustee to record the notice upon default).

22 As defendants did not violate the FDCPA by initiating non-judicial foreclosure
 23 proceedings upon Regas’s default of the mortgage note, defendants did not in turn violate NRS §
 24 649. Accordingly, the court shall grant moving defendants’ motion as to this claim.

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1 **B. Nevada Unfair and Deceptive Trade Practices Act**

2 Pursuant to NRS 598.0923 it is a deceptive trade practice to conduct business in the State of
3 Nevada without all required state, county or city licenses. NRS 598.0923(1). Regas alleges that
4 defendants violated the statute by recording the underlying notice of default without having a state
5 business license.

6 Here, defendant Quality acted as the foreclosure trustee in this matter. A foreclosure trustee
7 does not have to be licensed to record a notice of default because a foreclosure trustee is not a debt
8 collector. *See e.g., Hulse*, 195 F. Supp. 2d 1188; *Charov*, 2010 U.S. Dist. LEXIS 65798. Further,
9 Regas has failed to allege why or how the remaining moving defendants conducted business as a
10 debt collector that should have been licensed. Therefore, the court finds that Regas has failed to
11 state a claim upon which relief can be granted and shall grant defendants' motions on this claim.

12 **C. Nevada Unfair Lending Practices Act**

13 NRS 598D.100 prohibits lenders from making loans "without determining, using
14 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home
15 loan." NRS 598D.100(1)(b). Here, moving defendants were not involved in the origination of
16 Regas's mortgage loan. A defendant who did not make the loan at issue cannot be subject to an
17 unfair lending practices claim. *See e.g., Velasquez v. HSBC Mortgage Services*, No. 2:09-cv-0784-
18 KJD-LRL, 2009 WL 2338852, *3 (D. Nev. 2009).

19 **D. Breach of Good Faith and Fair Dealing**

20 Under Nevada law, "[e]very contract imposes upon each party a duty of good faith
21 and fair dealing in its performance and execution." *A.C. Shaw Constr. v. Washoe County*, 784
22 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for
23 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the
24 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and
25 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner
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1 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.
2 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*
3 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991)).

4 Here, Regas alleges that defendants breached the implied covenant because they
5 misrepresented the cost of credit involved in the loan agreement. However, moving defendants
6 were not a party to the origination of the loan. Thus, moving defendants could not have
7 misrepresented any portion of the loan agreement.

8 Additionally, Regas's alleged misrepresentations occurred *before* a contract was formed. A
9 party cannot breach the covenant of good faith and fair dealing before a contract is formed. *See*
10 *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 941 (2d Cir. 1998) ("an
11 implied covenant relates only to the performance of obligations under an extant contract, and not to
12 any pre-contract conduct"). Accordingly, the court shall grant defendants' motions as to this issue.

13 **E. NRS 107.080**

14 Regas argues that defendants violated NRS 107.080 by not complying with the applicable
15 provisions in NRS 107.086 and 107.087 concerning recordation and mailing of the notice of
16 default. However, the court has reviewed the documents and pleadings on file in this matter and
17 finds that the chain of title shows that Quality, as the foreclosure trustee, substantially complied
18 with the provisions of NRS 107.080 in causing the notice of default to be recorded and in mailing a
19 copy of the notice of default by certified mail.

20 Additionally, recordation and mailing of a notice of default is not a violation of the FDCPA
21 because it is not an attempt to collect the debt from the borrower. *See Maynard v. Cannon*, 650 F.
22 Supp. 2d 1138, 1143-1144 (D. Utah 2006). As such, Quality did not need to be licensed to have the
23 notice of default recorded. *See e.g., Hulse v. Ocwen Fed. Bank FSB*, 195 F. Supp. 2d 1188 (D. Or.
24 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev. 2010). Accordingly, the court shall
25 grant defendants' motion as to this claim.

1 **F. Quiet Title**

2 Under Nevada law, a quiet title action may be brought by someone who claims an adverse
3 interest in property. NRS § 40.010. Here, no defendant claims an interest in the property that is
4 adverse to Regas. Therefore, Regas has no grounds to quiet title against moving defendants.

5 **G. Fraud**

6 “In alleging fraud or mistake, a party must state with particularity the circumstances
7 constituting fraud or mistake.” FED. R. CIV. P. 9(b). In order to meet the heightened pleading
8 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well
9 as the names of the parties involved. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th
10 Cir. 1999); *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a
11 plaintiff to allege the requisite who, what, where, when, and how of the misrepresentation).

12 Here, Regas fails to allege anything more than defendants omitted important information
13 from his loan documents and made misrepresentations about his loan to him during the loan
14 process. However, there are no allegations of who failed to provide the information or what
15 information was not provided. Further, Regas fails to allege any facts to support misrepresentations
16 made during the loan process against moving defendants who were not a party to the origination of
17 the loan. Therefore, the court finds that Regas’s allegations are insufficient to support his claims
18 for fraud.

19 **H. Unjust Enrichment**

20 To set forth a claim for unjust enrichment, a plaintiff must allege that a defendant unjustly
21 retained money or property of another against fundamental principles of equity. *See Asphalt Prods.*
22 *Corp. v. All Star Ready Mix*, 898 P.2d 699, 700 (Nev. 1995). However, an action for unjust
23 enrichment cannot stand when there is an express written contract which guides that activities of
24 the parties. *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187
25 (Nev. 1997).

1 Here, there was a written contract between the parties, namely, the deed of trust and
2 mortgage note. These documents guided the interactions, obligations, and rights of the parties. As
3 such, Regas cannot make a claim in equity for actions that are controlled by a contract to which he
4 is a party. *See LeasePartners Corp.*, 942 P.2d at 187-88.

5 In opposition, Regas argues that there is no direct contract between himself and moving
6 defendants as loan servicers and foreclosure trustees and that his claim for unjust enrichment is
7 based on moving defendants retention of monetary benefits related to their services despite the lack
8 of an express contract authorizing their retention of these benefits. However, the loan servicers and
9 foreclosure trustees' rights to conduct a non-judicial foreclosure and retain money from servicing
10 the loan arise from the mortgage note, deed of trust, and subsequent transfers of rights related to
11 these documents to which Regas is a party. Accordingly the court shall grant defendants' motion as
12 to Regas's claim for unjust enrichment.

13 **I. Injunctive and Declaratory Relief**

14 Claims for injunctive or declaratory relief are remedies that may be afforded to a party after
15 he has sufficiently established and proven his claims; they are not a separate causes of action. *See*
16 *e.g., In re Wal-Mart & Hour Employment Practices Litig.*, 490 F. Supp. 1091, 1130 (D. Nev. 2007)
17 (holding that a claim for injunctive relief was not a separate cause of action or independent ground
18 for relief). Here, Regas's claims fail to establish any claim for relief. Accordingly, Regas is not
19 entitled to injunctive or declaratory relief.

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1 IT IS THEREFORE ORDERED that defendant's motion to dismiss the amended complaint
2 (Doc. #30) is GRANTED. Defendant Mortgage Electronic Registration Systems, Inc. is
3 DISMISSED as a defendant in this action.

4 IT IS FURTHER ORDERED that defendants' motion to dismiss or for summary judgment
5 (Doc. #33) is GRANTED. Defendants Quality Loan Service Corporation; LSI Title Company; LSI
6 Title Agency, Inc.; and joining defendant Ticor Title of Nevada, Inc. are DISMISSED as
7 defendants in this action.

8 IT IS SO ORDERED.

9 DATED this 14th day of December, 2010.



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12 LARRY R. HICKS
13 UNITED STATES DISTRICT JUDGE
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